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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN DANIEL GATES,

Defendant and Appellant.

G051126, G051410

(Super. Ct. No. RIF154674)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Charles J. Koosed, Judge. Affirmed.

Kristen A. Erickson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and
Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christian Daniel Gates of two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a); counts 1 & 5; all further references are to the Penal Code); carrying a loaded firearm (former § 12031, subd. (a)(2)(B); count 2);¹ attempted murder (§§ 187, subd. (a), 664; count 3); and attempted robbery (§§ 211, 664; count 4). The jury found true allegations Gates personally and intentionally discharged a firearm during the commission of counts 3 and 4 (§§ 1192.7, 12022.53, subd. (c)), and that he committed counts 1, 3, 4, and 5 for the benefit of a criminal street gang (§ 186.22, subd. (b)).

Gates received a life sentence for premeditated attempted murder. However, on appeal, this court discovered the jury had not been asked to make a finding Gates committed premeditated attempted murder. Thus, we remanded the case for a new sentencing hearing, and affirmed the judgment in all other respects. (*People v. Gates* (Jul. 11, 2014, G049834) [nonpub. opn.])

On remand, the court imposed a total determinate term of 53 years. Gates argues the court's imposition of sentence on counts 2 and 4 violates section 654, the court's failure to state adequate reasons for imposing consecutive sentences on all subordinate counts violates section 1170, subdivisions (b) and (c) and the Rules of Court; and the court misunderstood how to impose consecutive sentences on subordinate counts.

Should we conclude Gates forfeited any of these arguments by failing to object at the resentencing hearing, he also asserts the failure to object constitutes prejudicial ineffective assistance of counsel. We find these contentions meritless and affirm the judgment.

¹ Former section 12031 was repealed effective January 1, 2011. (Stats. 2010, ch. 711, § 4.) It is now codified at section 25850, subdivisions (a) and (c)(3). (Added by Stats. 2010, ch. 711, § 5.)

FACTS

For a complete statement of facts, see this court's previous opinion.

(*People v. Gates, supra*, G04984.) The facts pertinent to Gates's second appeal are these:

On December 7, 2009, Kenya Gutierrez's home was burglarized and her .40-caliber Smith & Wesson handgun stolen.

Around 1:00 p.m. that afternoon, Gates and Daryl Knighten, two members of the Sex Cash Money criminal street gang, went to a recycling center in Moreno Valley with a bag of recyclables. Kongsak Worasing sorted through the items and told Gates and Knighten he could give them \$1.61 for the lot. Worasing noted the amount in his ledger, and Gates signed the ledger, using the false name, James Baily.

Gates then reached inside a backpack and retrieved Gutierrez's .40-caliber handgun. He pointed the gun at Worasing's chest and demanded Worasing turn over all his cash. Worasing refused, saying, "I work too hard for my money." Gates aimed at Worasing's chest and pulled the trigger. The gun misfired, but Gates quickly cleared the jammed round and pulled the trigger a second time from point blank range. Gates missed Worasing, and Gates and Knighten fled the scene.

Around four hours after the shooting, Elsie Moore, who lived about a block away from the recycling center, found Gutierrez's .40-caliber handgun and Gates's student identification inside a backpack. Forensic evidence later linked shell casings found at the recycling center to Gutierrez's stolen gun.

DISCUSSION

1. *Section 654*

a. Background

As noted, the court originally imposed 15 years to life for premeditated, attempted murder (count 3), plus 20 years for firearm use. On the subordinate counts, the court imposed a consecutive upper term of six years for burglary (count 1), plus five years for the gang enhancement; a concurrent two-year term for carrying a loaded firearm

(count 2), a concurrent two-year term for attempted robbery (count 4), and a consecutive 16 months for burglary (count 5), plus a concurrent indeterminate term of 20 years to life for the gun enhancement and a concurrent five years for the gang enhancement.

When discussing count 4, the court said, “Whether you want to think it compassion or not, I’m going to run that concurrent [*sic*] meaning I’m not going to give him extra time for it. The reason being is that having heard the trial, factually this attempted robbery and the attempted murder are one in the same. They merged. The act of pointing the gun and saying, ‘Give me your money,’ the gun being -- attempted to be fired and misfiring, and then when he’s actually able to dislodge the shell casing and fire another bullet at the victim, all happens in a matter of seconds or minutes. [¶] Maybe legally speaking, there’s no [section] 654 issue there, but I’m going to exercise my discretion and give him the midterm for the attempted robbery”

The court concluded, “so the sentence on Count 4 would be 27 years. That time is to run concurrent with the life sentence handed down in Count 3, as I believe they are part of the same transaction and occurrence. [¶] Further, Count 2 I’m also going to find arose out of the same transaction and occurrence and run that concurrent”

At the resentencing hearing, defense counsel advocated for the mitigated term for attempted murder, citing evidence of Gates’s difficult childhood, the fact no one had been injured, and Gates’s satisfactory behavior while he awaited trial.

The court said it had “read and reread the probation officer’s report,” and reminisced, “I remember Mr. Gates from when I was in juvenile court. And his dad would come to every hearing. And unfortunately for Mr. Gates, he got in with a bad crowd and was unable to free himself of that crowd, I don’t know why, maybe just the gang culture. I’m just not sure. I know underneath all of that, he’s a good kid and becoming a young man and it’s unfortunate he’s going to spend a lot of his youth in state prison, but that’s from his own doing. You know, he engaged in what looks to me to be, you know, a crime spree; there’s [residential burglary], there’s 211, there’s attempted

murder, there's possession of stolen property. When they were stopped by police, he led them on a chase. They had to chase him up and down the mall there.

"You know, his behavior in all of these crimes certainly and his history both in juvenile court and in this case do not support the mitigated term. I don't even think they support midterm. This was serious behavior. They preyed upon an innocent, hapless victim trying to run a recycling business. They tried to rob him for \$12 or whatever he had."

As for the effect of Gates's crimes on Worasing, the court remarked, "Having a gun pointed at you and having the trigger pulled and the gun jam and then actually fired would scare the you-know-what out of me for the rest of my life. I would not be the same person. So even though there's no bullet hole in that man, I can assure you he's been physically and emotionally impacted by Mr. Gates'[s] behavior."

Finally, after declaring, "this case just screams aggravation to me," the court imposed the aggravated nine-year term for attempted murder, plus 10 years for the gang enhancement, and 20 years for the gun enhancement. As pertinent here, the court also imposed a consecutive eight months for carrying a loaded firearm (count 2) and a consecutive eight months for attempted robbery (count 4), plus a consecutive three years and four months for the robbery-related gun enhancement. With respect to count 4, the court observed, "He used the gun to effectuate the robbery. He then pulled the trigger to effectuate killing the victim."

b. Law

For the first time, Gates asserts the court violated section 654 by imposing consecutive sentences on counts 2 and 4. He did not forfeit the issue. Errors in the application of section 654 are correctable on appeal regardless of whether the defendant objects (*People v. Hester* (2000) 22 Cal.4th 290, 295), and resolution of the merits in this case also resolves Gates's concomitant ineffective assistance of counsel claim.

“Section 654 precludes multiple punishment where an act or course of conduct violates more than one criminal statute but a defendant has *only* a single intent and objective. [Citation.]” (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) “If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), disapproved on another point in *People v. Correa* (2012) 54 Cal.4th 331, 338.)

However, “where a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he [or she] may be punished for more than one crime even though the violations share common acts or are parts of an otherwise indivisible course of conduct.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

“As a general rule, the sentencing court determines the defendant’s ‘intent and objective’ under section 654. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.) Thus, the sentencing court has broad latitude, and its findings on the issue must be upheld if supported by substantial evidence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564 (*Garcia*).) In cases where there are no explicit findings, the reviewing court defers to the court’s implicit determination the defendant harbored multiple criminal objectives if supported by substantial evidence. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216-1217; *People v. Blake, supra*, 68 Cal.App.4th at p. 512.) The ultimate purpose of section 654 is “the defendant’s punishment will be commensurate with his criminal liability.” (*Neal, supra*, 55 Cal.2d at p. 20.) With these principles in mind, we turn to Gates’s arguments.

c. Count 2

With respect to count 2, Gates argues section 654 operates because his possession of a loaded firearm and attempted murder were committed solely to facilitate

the robbery. In part, he relies on statements the court made at the original sentencing hearing and asserts, “this was all one transaction and occurrence.”

Of course, Gates ignores the fact the court also said, “there’s no [section] 654 issue there,” and the court’s references to the imposition of concurrent terms on counts 2 and 4 being an act of compassion. Moreover, substantial evidence supports the court’s implicit finding Gates possessed the stolen, loaded firearm with an intent and objective apart from either attempted murder or attempted robbery.

We find *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1407-1414 (*Ratcliff*), instructive. In *Ratcliff*, the defendant was convicted of personal use of a firearm and being a felon in possession of a concealed firearm. (*Id.* at p. 1407.) On appeal, the defendant argued section 654 applied because the firearm use and being an ex-felon in possession of a concealable firearm were part of a continuous transaction. (*Id.* at p. 1408.)

Citing other cases involving gun-related crimes committed by ex-felons in possession of firearms, the *Ratcliff* court observed, “From *Bradford* and *Venegas*,^[2] we distill the principle that if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon.” (*Ratcliff, supra*, 223 Cal.App.3d at p. 1412; *Garcia, supra*, 167 Cal.App.4th at p. 1565; *Bradford, supra*, 17 Cal.3d at pp. 21-23.)

On the other hand, ““where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved.”” (*Ratcliff, supra*, 223 Cal.App.3d at p. 1408.) Thus, section 654 is inapplicable when, as here, there is evidence the defendant arrived at the scene of the

² *People v. Bradford* (1976) 17 Cal.3d 8, 13, 22 (*Bradford*) and *People v. Venegas* (1970) 10 Cal.App.3d 814, 18, 21.

crime already in possession of the firearm. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1145.)

Gates asserts *Ratcliff* has no relevance because he was not convicted of being an ex-felon in possession of a firearm. While true, *Ratcliff* applies by analogy. With both ex-felon in possession of a firearm, and possession of a loaded firearm, commission of the crime is complete “once the intent to possess is perfected by possession.” (*Ratcliff, supra*, 223 Cal.App.3d at p. 1414.)

But, Gates did not fortuitously come upon a gun during the commission of the attempted robbery and murder. The jury found Gates obtained the .40-caliber gun he used to commit both crimes by burglarizing Gutierrez’s home (count 1). Gates had the gun hidden in a backpack when he arrived at the recycling center. When Worasing refused to comply, Gates retrieved the stolen gun from a backpack and used it first in an attempt to get Worasing’s money, and then to take his life. Substantial evidence supports the court’s implied finding Gates harbored the independent intent and objective of possessing a loaded firearm before he used that same firearm to commit attempted robbery and murder.

d. Count 4

Gates asserts the attempted robbery and attempted murder “merged,” also relying on the court’s comments from the original sentencing hearing. His argument, again, myopically rests on the court’s observation the two crimes occurred within “a matter of seconds or minutes,” and he ignores the court’s express finding there was no section 654 issue.

In addition, substantial evidence supports the court’s implied finding Gates intended to both rob and kill Worasing. For instance, the attempted robbery was complete when Worasing refused to hand over his money. (*People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299.) A separate act of violence after the robbery is complete, “whether gratuitous or to facilitate escape or to avoid prosecution,” may be found “not

incidental to robbery for purposes of section 654.” (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193 (*Nguyen*).)

As the *Nguyen* court noted, “[A]t some point the means to achieve an objective may become so extreme they can no longer be termed ‘incidental’ and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. We should not lose sight of the purpose underlying section 654, which is ‘to insure that a defendant’s punishment will be commensurate with his culpability.’ [Citations.]” (*Nguyen, supra*, 204 Cal.App.3d at p. 191.)

In this case, Gates presented a bag of recyclables for Worasing’s appraisal. After signing Worasing’s ledger with a false name, Gates retrieved the gun and demanded his money. Worasing refused. So the attempted robbery was complete.

Gates then pointed his gun at Worasing’s chest and pulled the trigger. The gun jammed, but Gates did not stop his criminal enterprise. To the contrary, Gates quickly cleared the jam and fired a second shot at Worasing’s chest from point blank range. The act of consciously clearing a jammed round and firing again evidences an intent and objective quite apart from committing a robbery, and constitutes force beyond what was necessary to commit robbery. As the court observed, Gates used the gun to effectuate the attempted robbery before he used the gun to effectuate attempted murder. Substantial evidence supports the court’s implied finding section 654 does not bar separate punishment for attempted murder and attempted robbery.

2. *Discretionary Sentencing Choices*

The court did not give a statement of reasons for the imposition of consecutive terms on the subordinate counts. Gates did not object to the court’s failure to state reasons for the imposition of consecutive sentences on counts 2 and 4 below. Our Supreme Court has held, “A party in a criminal case may not, on appeal, raise ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ if that party did not object to the sentence at trial.” (*People v.*

Gonzalez (2003) 31 Cal.4th 745, 751.) Nevertheless, we will address the merits in connection with Gates's ineffective assistance of counsel claim below.

3. *Ineffective Assistance of Counsel*

Gates argues his attorney's failure to object on section 654 grounds, to the court's failure to state reasons for the imposition of consecutive sentences, and to the court's mistaken impression it could impose one-third the aggravated term on subordinate counts, constitutes ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

We have concluded counsel's failure to object on section 654 grounds did not waive the issue on appeal and, in any event, the court did not violate section 654. Regarding the other asserted sentencing errors, assuming without deciding counsel's failure to object constitutes deficient performance, Gates still fails to demonstrate he would have obtained a more favorable sentence if his attorney had objected. (*People v. Benavides* (2005) 35 Cal.4th 69, 93 [defendant must establish prejudice].)

When making discretionary sentencing choices, the California Rules of Court permits the court to consider certain enumerated criteria, and "additional criteria reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).) "Only one criterion is necessary to impose a consecutive sentence." (*People v. King* (2010) 183 Cal.App.4th 1281, 1323.)

Generally, trial courts retain broad sentencing discretion when choosing between concurrent and consecutive sentences. (*Bradford, supra*, 17 Cal.3d at p. 20.) Thus, "[i]n the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.]" (*Ibid.*) And, Gates cannot establish an abuse of discretion unless we conclude the court's decision "exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*Ibid.*)

As pertinent to this case, California Rules of Court, rule 4.425(a), lists factors to consider when deciding to impose consecutive or concurrent sentences: (1) whether “[t]he crimes and their objectives were predominantly independent of each other”; (2) whether “[t]he crimes involved separate acts of violence or threats of violence”; and (3) whether “[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425(a)(1), (2), (3).)

But, “[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant’s prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences.” (Cal. Rules of Court, rule 4.425(b)(1), (2), (3).)

Gates’s probation report listed three factors in aggravation related to the crimes: 1. “The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness”; 2. “The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission”; and 3. “The manner in which the crime was carried out indicates planning, sophistication, or professionalism.” There were no mitigating circumstances listed.

With respect to Gates, the report listed violent conduct indicating dangerousness, and his increasingly violent criminal record, as factors in aggravation. The fact he “voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process[,]” was the sole listed mitigating circumstance.

As noted above, a single criterion may support the court’s exercise of discretion to impose consecutive sentences. Assuming the court used acts of great violence to impose the aggravated term for attempted murder, the probation report listed several other factors that would justify the imposition of consecutive sentences on the

subordinate counts. For instance, Gates committed multiple violent crimes in a sophisticated scheme to get money, and he enlisted the aid of a confederate. In any event, the court clearly believed imposing consecutive sentences on counts 2 and 4 was punishing Gates in proportion to his culpability, and the court's determination does not violate state sentencing provisions, nor Gates's constitutional rights.

Gates also contends the court mistakenly believed it could impose one-third of the aggravated term on the subordinate counts. He bases his argument on the court's comment, "I think I'm entitled to do one-third of any term given the fact that there's enhancements on those subordinate terms including the upper term. But I will stick to the traditional sentencing scheme and give him one-third the midterm and one-third of the enhancement, if there is a midterm, it will be one-third of that midterm." But, regardless of the court's statements, there was no error. The court did not impose one-third the aggravated term on any subordinate offense or enhancement.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.